

No. 11864

United States
Circuit Court of Appeals
For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED
APR 24 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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Portland, Oregon,
For Appellant.

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ROCKWOOD,

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Portland, Oregon,
For Appellee.

District Court of the United States
for the District of Oregon

Civil No. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

DEFENSE SUPPLIES CORPORATION,
a corporation,
Defendant.

COMPLAINT

Now Comes Plaintiff and for Its Cause of Action
Herein alleges as follows:

First Cause of Action

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington and is engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and Amendments thereto. With connecting carriers, its railroad forms a through line for interstate railroad transportation between New Orleans, Louisiana, and North Portland, Oregon.

II.

Defendant is a corporation organized and existing under the laws of the United States.

III.

On April 14, 1943, defendant caused to be delivered to a connecting carrier of plaintiff at New Orleans, Louisiana, eleven carloads, and on April 15, 1943, one carload, of alcohol for transportation over the lines of plaintiff and its connecting carriers to North Portland, Oregon. Said shipments were duly [1*] accepted for such transportation by said initial carrier and were thereupon transported by said connecting carriers and plaintiff to destination at North Portland, Oregon, where delivery was made in accordance with shipping directions theretofore given by defendant. A statement showing the complete detail of said twelve shipments is annexed hereto marked "Exhibit A" and hereby made a part of this complaint.

IV.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful charges for transporting such shipments from said point of origin to destination was \$7474.74. Defendant has paid on account of said charges the sum of \$6170.39, and there remains due from defendant to plaintiff on account of said transportation charges the sum of \$1304.35, which said sum defendant has failed and refused and continues to fail and refuse to pay.

Second Cause of Action

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington and is

*Page numbering appearing at foot of page of original certified Transcript of Record.

engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and amendments thereto. With connecting carriers, its railroad forms a through line for interstate railroad transportation between New Orleans and Harvey, Louisiana, and Portland and Eugene, Oregon, and Seattle and Pasco, Washington.

II.

Defendant is a corporation organized and existing under the laws of the United States.

III.

Between April 14, 1943, and April 22, 1943, defendant caused to be delivered to a connecting carrier of plaintiff at New Orleans and Harvey, Louisiana, thirty-three carloads of alcohol for transportation over the lines of plaintiff and its connecting carriers to Portland, Oregon, Eugene, Oregon, Seattle, Washington, and Pasco, Washington. Said shipments were duly accepted for such transportation by said initial carrier and were thereupon transported by said connecting carriers and plaintiff to said destinations where delivery was made in accordance with shipping directions theretofore given by defendant. A statement showing the complete detail of said thirty-three shipments is annexed hereto marked "Exhibit B" and hereby made a part of this complaint.

IV.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful

charges for transporting such shipments from said points of origin to destination, and for accessorial transportation service, was \$24,053.32. Defendant has paid on account of said charges the sum of \$11,212.58, and there remains due from defendant to plaintiff on account of said transportation charges the sum of \$12,840.74, which said sum defendant has failed and refused and continues to fail and refuse to pay.

Wherefore, plaintiff demands judgment against defendant in the sum of \$1304.35 on its first cause of action, and in the sum of \$12,840.74 on its second cause of action, and for costs and its disbursements herein.

CHARLES A. HART,
Attorney for Plaintiff. [3]

State of Oregon,
County of Multnomah—ss.

I, A. J. Witchel, being first duly sworn, depose and say:

I am secretary of Spokane, Portland and Seattle Railway Company, plaintiff above named; that I have read the foregoing complaint, know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL.

Subscribed and sworn to before me this 24th day of April, 1945.

[Seal] CAROLINE EVANS,
Notary Public for Oregon.

My commission expires March 17, 1948.

[Endorsed]: Filed April 25, 1945. [4]

[Title of District Court and Cause.]

**ORDER TO SUBSTITUTE NAME OF
DEFENDANT**

Plaintiff appearing by Mr. Hugh L. Biggs, of counsel, defendant by Mr. Dewey Palmer, of counsel. Whereupon, upon oral motion of the plaintiff,

It Is Ordered that the Reconstruction Finance Corporation be substituted as defendant herein in place of the Defense Supplies Corporation. [10]

October 8, 1945.

In the District Court of the United States
for the District of Oregon

Civil No. 2764

**SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY**, a corporation,
Plaintiff,

vs.

**RECONSTRUCTION FINANCE
CORPORATION**, a corporation,
Defendant.

**FIRST AMENDED ANSWER AND
COUNTERCLAIM**

Comes now the Defendant, Reconstruction Finance Corporation, and files the following answer and counterclaim as its first amended answer herein :

Answering First Cause of Action

I.

Defendant admits the allegations stated in Paragraphs I and II in the first cause of action of the complaint.

II.

Defendant admits that twelve carloads of alcohol were transported by the Plaintiff as stated in Paragraph III in said first cause of action, and that the Defendant paid the Plaintiff \$6170.39 computed at the rate of \$1.23 as set forth in Exhibit A attached to and made a part of said complaint, but Defendant denies each and every other allegation in said Paragraph III.

III.

Defendant admits that it has paid the sum of \$6170.39 to the Plaintiff and that it has refused to pay any additional sum and denies each and every other allegation in Paragraph IV of said cause of action.

IV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

For a first further separate and distinct defense thereto, Defendant alleges: [16]

I.

Defendant, Reconstruction Finance Corporation, is an instrumentality of the United States, created by Act of Congress on January 22, 1932 (15 USCA 601-617). That all of its capital stock is owned by the United States.

II.

Defense Supplies Corporation was created and organized by Reconstruction Finance Corporation pursuant to authority of the Act of Congress of June 25, 1940, (15 USCA 606b-3) as an instrumentality of the United States in order to aid the Government in its national defense program and for the purpose of producing, acquiring, carrying, selling, or otherwise dealing in strategic and critical materials as defined by the President, and of purchasing and producing supplies for the manufacture of strategic and critical materials and other articles and supplies necessary to the national defense; and Defense Supplies Corporation was so existing and acting at all times stated in the complaint.

III.

By authority of Public Law 109, 79th Congress, approved June 30, 1945, Defense Supplies Corporation was dissolved, effective July 1, 1945, and all of its functions, powers, duties and authority were transferred, together with all its documents, books of account, records, assets and liabilities of every kind and nature, to Reconstruction Finance Corporation, to be performed, exercised and administered by the latter corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

IV.

By order of this Court, subsequent to the filing of the complaint, Reconstruction Finance Corporation has been substituted as defendant for the originally-named defendant, Defense Supplies Corporation.

V.

That all of the alcohol shipments set forth in the complaint were "tax-free" transportation of alcohol by the United States Government; that the duly filed tariff rate applicable to said transportation is \$1.23 per cwt. less appropriate applicable land-grant percentage deductions. [17]

Answering Second Cause of Action

I.

Defendant admits the allegations stated in Paragraphs I and II in the second cause of action in the complaint.

II.

Defendant admits that thirty-three carloads of alcohol were transported as stated in Paragraph III in the second cause of action and that defendant paid to plaintiff \$11,212.58 and denies each and every other allegation in said Paragraph III.

III.

Defendant admits that it has paid the sum of \$11,212.58 to plaintiff and has refused to pay any additional sum and denies each and every other allegation in Paragraph IV of said cause of action.

IV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

For a first further separate and distinct defense thereto, defendant alleges:

I.

Defendant re-alleges all the allegations contained in Paragraphs I, II, III and IV of the first further separate defense to the said first cause of action.

II.

That all of the alcohol shipments set forth in the complaint were "tax-free" transportation of alcohol by the United States Government; that the duly filed tariff rate applicable to said transportation is \$1.23 per cwt. less land-grant percentage deductions as hereinafter set forth.

III.

That all said shipments are entitled to land-grant percentage deduction from the said tariff rate of \$1.23, so that the net rate that may be lawfully charged for transportation of said alcohol is \$0.6665. The land-grant rate is applicable herein for the reasons that all of said alcohol was purchased and acquired by the [18] said Defense Supplies Corporation prior to the transportation thereof as alleged in the complaint and was owned by and was the property of the Defense Supplies Corporation at all of the times mentioned therein; that the alcohol was at all times mentioned in the complaint defined by the President of the United States as a strategic and critical material; that the alcohol was so purchased, acquired and caused to be transported by the Defense Supplies Corporation on the recommendation and request of the War Production Board and for the sole and exclusive purpose of furthering the defense program of the United States

Government in time of war; that the purchase, acquiring and transportation of the alcohol in question was necessary for military and naval uses of the United States; that said alcohol was military and naval property of the United States within the meaning of Section 321 of the Transportation Act of 1940 and that said shipments and the transportation thereof were movements for military and naval and not for civilian use within the meaning of said section; that said shipments were made over railroads which were aided in their construction by grants of land under land-grant acts and that the charges for said transportation at the rates and on the tariffs alleged and referred to hereinabove were subject to land-grant deductions as provided by law.

COUNTERCLAIM

For a counterclaim to the first cause of action in the complaint, defendant alleges:

I.

Defendant refers to and hereby incorporates as fully as though here repeated Paragraphs I, II, III, IV and V of the first further separate defense to the said first cause of action, and Paragraph I of the first cause of action of the complaint.

II.

On April 14, 1943, Defense Supplies Corporation caused to be delivered by a connecting carrier of plaintiff at New Orleans, Louisiana, eleven carloads and on April 15, 1943, one carload of alcohol

for transportation over the lines of plaintiff and its connecting carriers to North Portland, Oregon. Said shipments are the same transportation services as set forth in the first cause of action in the complaint.

That said alcohol was purchased and acquired and caused to be transported by Defense Supplies Corporation on the recommendation and request of the War Production Board and for the sole and exclusive purpose of furthering the defense program of the United States Government in time of war; that the purchase, acquiring and [19] transportation of the said alcohol was necessary for military and naval uses of the United States; that said alcohol was military and naval property of the United States within the meaning of Section 321 of the Transportation Act of 1940 and that said shipments and the transportation thereof were movements for military and naval and not for civilian use within the meaning of said section; that said shipments were made over railroads which were aided in their construction by grants of land under land-grant acts and that the charges for said transportation as hereinbelow mentioned were subject to land-grant deductions as provided by law.

The specific movement of the alcohol involved in this action was accomplished at the order of the Treasury Department Procurement Division of the United States Government on a freight-prepaid basis from the Defense Supplies Corporation, as consignor, to the War Shipping Administration, as principal for the Soviet Government Purchasing

Commission. All of said alcohol was transported to the Soviet Union under Lend-Lease Agreement between the United States Government and the Soviet Government. Said arrangement between the Treasury Department and Defense Supplies Corporation provided that the transportation charges herein involved were to be paid initially by the Defense Supplies Corporation and reimbursed to the Defense Supplies Corporation upon presentation of invoices to the Treasury Department of the United States Government.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful charges for transportation, for the public at large, of the said shipments of alcohol were \$6170.39; that the defendant was entitled to land-grant deduction therefrom in the sum of \$2826.08. Notwithstanding the right of defendant to having said sum of \$2826.08 deducted as aforesaid, the plaintiff demanded and received payment from defendant said sum of \$6170.39.

III.

Defendant duly filed a claim against the plaintiff for said overcharge, and the plaintiff notified defendant in writing dated March 9, 1944, that said claim was denied. The claim set forth herein is for recovery of charges with respect to the same transportation service set forth in the first cause of action in the complaint and arises out of the subject matter of said cause of action.

Plaintiff has failed and refused and continues to fail and refuse to pay [20] said sum of \$2826.08 to the defendant.

Wherefore, the defendant prays judgment against the plaintiff in the sum of \$2826.08, together with interest and costs, and that the complaint of the plaintiff be dismissed with costs to the defendant.

/s/ DEWEY H. PALMER,

Of Attorneys for Defendant.

[Endorsed]: Filed Apr. 30, 1946. [21]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable James Alger Fee, District Judge, on October 14(F), 1947. Plaintiff was represented by Manley B. Strayer, of its attorneys, and defendant, Reconstruction Finance Corporation, was represented by Dewey H. Palmer, of its attorneys.

Based on the proceedings had at said pre-trial hearing.

It Is Ordered, that the following matters are admitted as to the issues framed by the complaint herein and the answers and counterclaims thereto:

I.

1. Plaintiff is a corporation organized and existing under the laws of the State of Washington and is engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and

amendments thereto. With connecting carriers, the railroad forms a through-line for interstate railroad transportation between New Orleans and Harvey, Louisiana, and North Portland, Portland and Eugene, Oregon, and Seattle and Pasco, Washington.

2. Defense Supplies Corporation was, during all of the times hereinafter mentioned prior to July 1, 1945, a corporation duly created by the Reconstruction Finance Corporation at the request of the Federal Loan Administrator with approval of the President, pursuant to authority contained in Section 5d of the Reconstruction [37] Finance Act, as amended, with its principal office in Washington, D. C. By authority of Public Law 109, 79th Congress, Defense Supplies Corporation was dissolved effective July 1, 1945, and all of its functions, powers, duties and authority were transferred to Reconstruction Finance Corporation, to be performed, exercised and administered by the latter corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation. Reconstruction Finance Corporation is an instrumentality of the United States Government, created by Act of Congress on January 22nd, 1942. All of its capital stock is owned by the United States. At all of the times hereinafter mentioned the Defense Supplies Corporation and/or its successor as aforesaid, the Reconstruction Finance Corporation, did and now does business and had and now has an agent and representative in Portland, in the District of Oregon.

3. The first cause of action in this case involves the transportation of 12 carloads of alcohol over the lines of plaintiff and its connecting carriers to North Portland, Oregon. The second cause of action in this case involves the transportation of 33 carloads of alcohol over the lines of plaintiff and its connecting carriers to Portland, Oregon, Eugene, Oregon, Seattle, Washington, and Pasco, Washington. A permissive counterclaim by the defendant Reconstruction Finance Corporation herein involves the transportation of 54 carloads of alcohol delivered to Illinois Central Railroad Company for transportation to Portland, Oregon. All of said alcohol was shipped from New Orleans and Harvey, Louisiana.

4. Each of the carriers participating in said transportation was at all times herein mentioned a party to and participated in the tariff or tariffs specifying the rate or rates for transportation of ethyl alcohol from New Orleans and Harvey, Louisiana, to the above mentioned destinations. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce Commission, as required by the provisions of Section 6 of Part I of the Interstate [38] Commerce Act, and were in legal effect at the time when the shipments were made.

5. Said shipments involved in the first and second cause of action were billed and forwarded "charges collect" and Defense Supplies Corporation, claiming that the rate on the alcohol should be \$1.23 cwt. in accordance with Item 1563 of Trans-

continental Freight Bureau West-Bound Tariff No. 4-T due to the alcohol being tax free paid the said 1.23 rate. The plaintiff, claiming that the applicable rate was Item 1497 of said tariff, accepted the amounts so paid by the Defense Supplies Corporation under protest as part payments only.

6. The tariff rates properly applicable to said shipments were subject to land-grant deductions in accordance with the formula that has been applied by the defendant to all the transportation involved in this case, since the alcohol was owned by Defense Supplies Corporation at the time of said transportation and was shipped to the Soviet Union under Lend Lease Agreement between the United States and the Soviet Government for use by the Army of the Soviet Union in the manufacture of explosives and synthetic rubber. All of said alcohol was transported under an arrangement between the Treasury Department and Defense Supplies Corporation whereby the charges were to be paid initially by the Defense Supplies Corporation and reimbursed to the Defense Supplies Corporation upon presentation of invoices to the Treasury Department of the United States Government.

7. If Item 1563 of the Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.23 cwt.) is applicable, the defendant, Reconstruction Finance Corporation is entitled to recover from the plaintiff, the Spokane, Portland & Seattle Railway Company, the sum of \$2,826.08 in the first cause of action herein, but if Item 1497 of said tariff is the appli-

cable rate (1.49 cwt.) then the defendant is entitled to recover from the plaintiff in the first cause of action the sum [39] of \$2,119.12.

8. Defendant, Reconstruction Finance Corporation, is entitled to recover from the plaintiff, Spokane, Portland & Seattle Railway Company, the sum of \$311.28 on the second cause of action herein if Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.23 cwt.) is applicable, but if item 1497 of said tariff is applicable then the plaintiff is entitled to recover from the defendant the sum of \$1865.96 in said second cause of action.

9. On June 14, 1943 to and including June 23, 1943 the Defense Supplies Corporation caused to be delivered to Illinois Central Railroad Company at New Orleans, Louisiana, 54 carloads of ethyl alcohol for prepaid transportation to Portland, Oregon. The Defense Supplies Corporation paid the Illinois Central Railroad Company the sum of \$31,921.68 as transportation charges thereon. The Defense Supplies Corporation filed a claim for overcharges in the sum of \$17,681.92 against the Illinois Central Railroad Company, based upon the same matters as are claimed herein with respect to the first and second causes of action, a copy of which claim is attached hereto and marked Exhibit A and made a part hereof. Said claim was disallowed by the Illinois Central Railroad Company in written notices of such disallowances addressed to Defense Supplies Corporation dated April 30,

1946, with respect to its claim for land grant deductions and letter dated May 14, 1946, with respect to its claim that Item 1563 of the Transcontinental Freight Bureau West-Bound Tariff 4-T was applicable instead of Item 1497 of said tariff. The defendant has counterclaimed herein against the plaintiff for said sum of \$17,681.92. Only nine of said cars were transported by plaintiff from Pasco, Washington, to Portland, Oregon, pursuant to said contract of carriage. If item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.16 cwt.) is applicable, defendant is entitled to recover from plaintiff the sum of \$3012.82; but if item 1497 of said [40] tariff is applicable, defendant is entitled to recover from plaintiff the sum of \$2489.93 on said counterclaim. Defendant reserves the right to assert against Illinois Central Railroad Company or its connecting carriers its claim for refund on the remainder of said 54 cars.

It Is Further Ordered, that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I.

Plaintiff, Spokane, Portland and Seattle Railway Company contends that the rate applicable to all of the shipments of alcohol involved in this case is Item No. 1497 of the Transcontinental Freight Bureau Tariff 4-T subject to land-grant deductions, and the defendant Reconstruction Finance Corporation contends that Item No. 1563 of said tariff, subject to land-grant deductions, is applicable.

II.

The issues as to computation of rates herein involve mixed questions of law and fact to be determined upon the trial. The parties will supplement the stipulated facts by some explanatory testimony.

III.

Exhibits—Exhibits introduced at the pre-trial are contained in list attached hereto and made a part of this order. All of such exhibits were admitted without objection as to authenticity and plaintiff may object to the admissibility at the trial of defendant's pre-trial Exhibits Nos. 1, 3, 4, 5(F), 6, 12 and 13 on the ground that they are immaterial in this action. No other documents or factual exhibits will be used at the trial [41] or offered as exhibits except those contained in said list.

This order supersedes the pleadings which now pass out of the case. It shall not be amended at trial except to prevent manifest injustice.

Ordered this 14th day of October, 1947.

/s/ JAMES ALGER FEE,
Judge.

Approved by:

/s/ M. B. STRAYER,
Of Attorneys for Plaintiff,

/s/ DEWEY H. PALMER,
Of Attorneys for Defendant.

[Endorsed]: Filed Oct. 14, 1947. [42]

LIST OF DEFENDANT'S PRE-TRIAL
EXHIBITS

1. Photostat copy of letter from A. F. Cleveland, Vice-President, Association of American Railroads, to I. M. Griffin, Traffic Adviser, Defense Supplies Corporation, dated June 28, 1945.

2. Photostat copy of front cover and pages 102, 125, 126, 201, 202 and 209 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T.

3. Photostat copy of front cover and pages 382 and 383 of W. S. Curlett's Agent, Trunk Line Tariff Bureau, Tariff No. 23-M.

4. Photostat copy of front cover and pages 16, 18, 100, and 101 of Import Tariff No. 1021F of Southern Ports Foreign Freight Committee, issued by K. C. Bogue.

5. Photostat copy of front cover and page 2 of Import Freight Tariff No. 1022F of Southern Ports Foreign Freight Committee, issued by Jos. Hattendorf, Agent.

6. Photostat copy of front cover and pages 30, 45, 48, 49, 40 and 51 of New Orleans Freight Bureau Tariff, issued by W. P. Emerson, Jr., Agent, Freight Tariff 14-G.

7. Photostat copies of 12 shipping orders receipted for by Illinois Central Railroad Company, covering shipments in First Cause of Action.

8. Photostat copies of 32 Bills of Lading, covering shipments in Second Cause of Action.

9. Photostat copies of 9 Bills of Lading, issued by Illinois Central Railroad Company, covering

shipments in claim by Defense Supplies Corporation herein for overcharges.

10. Prepaid freight bills on 9 shipments involved in the above mentioned claim against Illinois Central Railroad Company.

11. Copy of bound volume of Transcontinental Freight Bureau West-Bound Tariff No. 4-T.

12. Letter from Finley & Clark, Vice Presidents of Great Northern Railway Company and Northern Pacific Railway Company, dated 8/21/47 addressed to I. M. Griffin.

13. (F) Bound volume of New York Central R. R. Co. Tariff 3010A(F). [43]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day the above entitled cause came on for trial and the Court, having heard the evidence, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. All of the alcohol involved in this proceeding was tax-free alcohol owned by Defense Supplies Corporation and Reconstruction Finance Corporation, each of which are instrumentalities of the United States.

2. Such alcohol was not alcohol in bond within the meaning of Item 1563 of Transcontinental Freight Bureau West Bound Tariff No. 4-T, but was alcohol N.O.S. within the meaning of Item 1497 of said tariff. The applicable rate for all such shipments was that specified in said Item 1497, subject to land grant deductions.

3. There is due and owing to defendant from plaintiff the sum of \$2,119.12 on defendant's counterclaim to plaintiff's first cause of action herein.

4. There is due and owing to plaintiff from defendant the sum of \$1,865.96, on plaintiff's second cause of action herein.

5. There is due and owing to defendant from plaintiff the sum of \$2,489.93, on defendant's permissive counterclaim herein. [44]

CONCLUSIONS OF LAW

The amount due from defendant to plaintiff should be set off against the amounts due from plaintiff to defendant, and judgment should be entered herein in favor of defendant for the sum of \$2,743.09.

It Is So Ordered and judgment will enter in accordance herewith.

JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Nov. 14, 1947. [45]

In the District Court of the United States
for the District of Oregon

Civil Action—File No. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,
Defendant.

JUDGMENT

This action having come on for trial before the Court without a jury, and the Court having entered herein its Findings of Fact and Conclusions of Law; and the Court being fully advised in the premises, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendant have and recover from the plaintiff the sum of \$2,743.09.

Dated at Portland, Oregon, this 24th day of November, 1947.

JAMES ALGER FEE,
District Judge.

Entered in docket Nov. 24, 1947.

[Endorsed]: Filed Nov. 24, 1947. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Reconstruction Finance Corporation, defendant, above named in the above entitled action does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 24th day of November, 1947.

/s/ DEWEY H. PALMER,

Of Attorneys for Reconstruction Finance Corporation, Defendant.

[Endorsed]: Filed Jan. 20, 1948. [47]

[Title of District Court and Cause.]

DEFENDANT, APPELLANT'S DESIGNATION OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

Defendant, Appellant, Reconstruction Finance Corporation, designates the entire record and all proceedings and evidence in the above entitled case to be contained in the record on appeal, including:

1. Complaint.
2. Summons with marshal's return.
3. Order substituting Reconstruction Finance Corporation in place of Defense Supplies Corporation.
4. Answer of Reconstruction Finance Corporation.

5. First amended answer and counterclaim of defendant, Reconstruction Finance Corporation.

6. Motion of plaintiff to strike defendant's counterclaim.

7. Motion for leave to amend answer of defendant Reconstruction Finance Corporation so as to set up Permissive Counterclaim.

8. Pre-trial order including exhibits rejected by the Court.

9. Findings of Fact and Conclusions of Law.

10. Judgment.

11. Transcript of testimony and proceedings at the trial.

12. Notice of appeal by Reconstruction Finance Corporation.

13. This designation.

14. Order to send exhibits.

BY: DEWEY H. PALMER,
Of Attorneys for Reconstruction Finance Corporation, defendant, appellant.

State of Oregon,
County of Multnomah—ss.

Service of the above Designation of Record is hereby accepted at Portland, Oregon, this 4th day of February, 1948, by receiving a copy thereof, duly certified to as such by Dewey H. Palmer of attorneys for defendant, appellant.

/s/ M. B. STRAYER,

Attorneys for Plaintiff,
Appellee.

[Endorsed]: Filed Feb. 4, 1948. [48]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO FORWARD
THE ORIGINAL EXHIBITS

On motion of Defendant, Reconstruction Finance Corporation, it is ordered that the Clerk of this Court forward to the Circuit Court of Appeals for the Ninth Circuit in connection with the appeal of the above entitled case all original exhibits including photostatic copies of the originals in accordance with the usual practice of this Court in regard to the safeguarding and transportation of original exhibits.

Dated at Portland, Oregon, this 18th day of February, 1948.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Feb. 18, 1948. [49]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 52 inclusive constitute the transcript of record on appeal from a judgment of said court

in a cause therein numbered Civil 2764 in which the Spokane, Portland and Seattle Railway Company, a corporation, is plaintiff, and appellee, and the Reconstruction Finance Corporation is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have also enclosed under separate cover a duplicate transcript of the testimony dated October 14, 1947, taken and filed in this office in this cause, together with exhibits Nos. 1 to 13 inclusive filed in this cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland in said District, this 20th day of February, 1948.

[Seal]

LOWELL MUNDORFF,

Clerk,

By /s/ F. L. BUCK,

Chief Deputy.

In the District Court of the United States
for the District of Oregon

No. Civ. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,
Defendant.

Before: Honorable James Alger Fee, Judge.

Appearances: Mr. Manley B. Strayer, of Attor-
neys for Plaintiff; Mr. Dewey H. Palmer, of
Attorneys for Defendant.

Court Reporter: Cloyd D. Rauch.

Portland, Oregon

Tuesday, October 14, 1947

PROCEEDINGS

Mr. Strayer: There was a matter I mentioned yesterday, that we would like to have a pre-trial exhibit added to the exhibits, and that would necessitate a change in writing to the pre-trial order. Would it be agreeable that we write that in pen and ink at this time, or should we do that—

The Court: Yes, put that in in pen and ink right now. Was there a firm substitution of the Reconstruction Finance Corporation?

Mr. Palmer: Yes, your Honor, there was.

The Court: The pre-trial order does not recite that, but I presume that is all right. I see no objection. The order is signed and entered. You may proceed.

Mr. Strayer: Does the Court desire an opening statement?

The Court: I will leave that to you.

Mr. Strayer: I thought I might briefly refresh your Honor's recollection. I think we have discussed these matters before. Briefly, there are three causes of action here, two of them in the plaintiff's complaint and one in a counterclaim by the defendant.

One of them, we brought suit for undercharges on two shipments of alcohol, and on the counterclaim the defendant sought recovery on what it claims to be an overcharge on a third shipment of alcohol between the same points. Also, the question of Land Grant rates enters in the causes of action, but in the counterclaim they have been removed by the pre-trial order in view of a recent Supreme Court decision, so that the sole issue remaining on each cause of action and in the counterclaim, the sole issue is whether or not the alcohol involved would be [2*] considered as in-bond alcohol, which would draw a lower rate, or alcohol designated as N.O.S. in the tariff, meaning "Not Otherwise Specified," which would draw a higher rate. In each case the railroad contends that the N.O.S. rate applies and the Government contends that the in-bond rate applies. That is the sole issue in the case.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The pre-trial order reserves to the plaintiff the right to object to the admission of certain exhibits, and the remainder of the exhibits that have been marked, Mr. Palmer and I are in agreement that they may be admitted.

Presently, I would like to ask that the following exhibits be admitted in evidence at this time: Numbers 2, 7, 8, 9, 10 and 11.

Mr. Palmer: No objection.

The Court: They are admitted.

(The documents referred to, so offered and received, were thereupon marked as follows:

(Photostat copy of front cover and pages 102, 125, 126, 201, 202 and 209 of Transcontinental Freight Bureau Westbound Tariff No. 4-T was marked received as Plaintiff's Exhibit 2;

(Photostat copies of 12 shipping orders receipted for by Illinois Central Railroad Company, covering shipments in First Cause of Action, were marked received as Plaintiff's Exhibit 7; [3]

(Photostat copies of 32 Bills of Lading covering shipments in Second Cause of Action were marked received as Plaintiff's Exhibit 8;

(Photostat copies of 9 Bills of Lading, issued by Illinois Central Railroad Company, covering shipments in claim by Defense Supplies Corporation for overcharges were marked received as Plaintiff's Exhibit 9;

(Prepaid freight bills on 9 shipments involved in claim against Illinois Central Railroad Company were marked received as Plaintiff's Exhibit 10; and

(Copy of bound volume of Transcontinental Freight Bureau Westbound Tariff No. 4-T was marked received as Plaintiff's Exhibit 11.)

Mr. Strayer: We will call Mr. Block as a witness.

ERNEST H. BLOCK

was thereupon produced as a witness in behalf of the plaintiff herein and was examined and testified as follows:

The Clerk: What is your name?

A. Ernest H. Block.

(The witness was then duly sworn.)

Direct Examination

By Mr. Strayer:

Q. Mr. Block, you live in Portland?

A. I do.

Q. Are you employed by the Spokane, Portland and Seattle Railway Company? A. I am.

Q. How long have you worked for the company?

A. About twenty-eight and one-half years.

Q. I am sorry, I can't hear you.

A. About twenty-eight and one-half years. A little better than twenty-eight years.

Q. And in what department are you employed?

A. Traffic department.

(Testimony of Ernest H. Block.)

Q. What sort of work do you do?

A. I work principally with rates and to some extent with divisions of rates between carriers.

Q. And does that work involve the application of tariffs to particular situations? [5]

A. It does, a great many times, involves the application and interpretation of tariffs.

Q. Now, are you familiar with the Exhibit 11, which is in evidence, which is the Transcontinental Freight Bureau Westbound Tariff No. 4-T?

A. I am.

Q. How long have you had occasion to work with that tariff?

A. Well, it was issued in 1942, I believe, and naturally I worked with it at the time it was in effect, and things have come up subsequent to the re-issue of that tariff which naturally bring a person back to the old tariff in effect at that time.

Q. Yes. Now, are you familiar with the transactions which are involved in this case, the three shipments of alcohol from Louisiana to Portland, Oregon?

A. I am.

Q. Have you examined the bills of lading and the other documents on those three shipments?

A. Yes, I have.

Q. And in particular have you examined the Plaintiff's Exhibits Nos. 7, 8 and 9 in this proceeding? These are the bills of lading which you examined a while ago, I believe, are they not?

A. Yes, I have examined those bills of lading.

(Testimony of Ernest H. Block.)

Q. Am I correct that in each of these bills of lading the commodity was described as Alcohol NOIBN, Tax Free, and I believe in some instances as Ethyl Alcohol NOIBN, Tax free?

A. You are.

Q. Will you explain to the Court the meaning of the term "NOIBN"? I believe that is explained in the tariff itself, is it not?

A. Yes, there is an item in the tariff that explains the provisions that you cite. The term "NOIBN"—

Q. Just a moment. I believe I would like to have you refer to the tariff. Mr. Bailiff, will you hand the witness Exhibit No. 11. Will you refer to Page 69 of that exhibit, Mr. Block.

A. The term "NOIBN" is explained in Item Number 8, Page 69, of this Transcontinental Freight Bureau Tariff 4-T, and maybe the best explanation is to read the definition as set forth in the tariff rather than to quote my own words. It says, for the explanation of "NOIBN," "When used in connection with an article in an item of this tariff carrying carload commodity rates, means 'not otherwise indexed by name in Western Classification nor otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirement.' "

Q. Now, as applied to alcohol or ethyl alcohol, does the term "NOIBN" enable you to determine the correct rate for it?

(Testimony of Ernest H. Block.)

A. The term "NOIBN" is not the proper description in conformity with the description of the commodities published in the commodity tariff. The reason for saying that is that there is no item in the tariff that specifically names Alcohol NOIBN as a [7] commodity.

Q. Then in determining the correct rate for those shipments what must you do, Mr. Block?

A. You have to refer to the tariff, and you have another description there, namely, "Alcohol NOS."

Q. Will you tell us what the meaning of "NOS" is then?

A. The term "NOS" is also defined in Item 8, and again I will take the liberty of reading from the tariff: "N.O.S. When used in connection with an article in an item of this tariff carrying carload commodity rates, means 'not otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirement.' "

Q. Now, Item 1497 of Transcontinental Freight Bureau Westbound Tariff No. 4-T refers to Alcohol NOS, does it not? A. It does.

Q. Now, what are the facts as to the application of Item 1497 to the particular shipments involved in this proceeding?

A. Well, Item 1497 covers Alcohol NOS, which means alcohol not otherwise specified in the tariff. If there were any other commodity item that covered these shipments that item becomes applicable,

(Testimony of Ernest H. Block.)

and the first thing to determine is whether there is any other item that specifically covers the commodity in question.

Q. What are the facts in this case whether there was any item [8] which specifically covered these shipments?

A. There is only one other item in the tariff that covers alcohol—I would like to correct that, please. There are two other items that cover alcohol. One is 1498, covers specific types of alcohol, but none that would cover alcohol as shipped in this particular case. The only other item that covers alcohol is Item 1563, which covers “Alcohol (other than denatured or wood), in bond.” It has been our position that the alcohol involved in this case was not in bond; consequently Item 1563 is inapplicable, and this item being inapplicable automatically makes the provisions of 1497 the proper rate item to apply.

Q. Then, in your opinion as a traffic man, is 1497 the correct item to apply to these shipments?

A. It is.

Mr. Strayer: You may cross-examine.

Cross-Examination

By Mr. Palmer:

Q. How much experience have you had with classifying alcohol, Mr. Block?

A. Well, that is pretty hard to determine, just how much experience I have had. The only answer to that is that in working with rates you work with

(Testimony of Ernest H. Block.)

commodities of all descriptions, and any commodity may come up at a time on which you have occasion to rule as to the applicable rates.

Q. But, I asked you, did you classify very many carloads of [9] alcohol, or apply the rates on very many carloads of alcohol, before these shipments of this tax-free alcohol from New Orleans to Portland?

A. The answer is no, I have not had occasion to——

Q. Would you say that this is the first time that you ever applied rates to a shipment, a carload shipment, of alcohol?

A. To the best of my knowledge, it is.

Mr. Palmer: That is all.

Redirect Examination

By Mr. Strayer:

Q. Do you know, Mr. Block, have you, in your department, had occasion to have the subject up with other traffic men? A. Yes, we have.

Q. The question of classification. Do you know whether the opinion you express is in harmony with that of other traffic men you have had it up with?

A. It is definitely in harmony with that of other traffic men.

Q. Now, do you have occasion to deal with other commodities that are shipped under bond?

A. Yes, principally shipments moving under customs bond.

Q. And have you had occasions to apply your tariffs to those shipments?

A. Quite a number of times, yes.

Mr. Strayer: That is all. [10]

(Testimony of Ernest H. Block.)

Recross-Examination

By Mr. Palmer:

Q. Who were some of these traffic men that you discussed the question with, Mr. Block?

A. Well, that is involved in our correspondence. I have seen the correspondence with other lines.

Q. So that your opinion is based upon correspondence from other lines. Can you give me the names of those other lines in that correspondence, please?

A. Yes, I can. There is the Great Northern, Northern Pacific, Illinois Central.

Q. Now, can you recall what the Illinois Central Railway Company said, in a general way, about the application of this rate?

A. Somewhere along the same lines that I have expressed, that the shipments could not be considered in bond.

Q. The Illinois Central Railway operates in a territory where there are other tariffs involved than the one that you have just referred to, does it not?

A. Yes, it does.

Mr. Palmer: I think that is all.

Mr. Strayer: That is all, Mr. Block.

(Witness excused.)

Mr. Strayer: The plaintiff rests, your Honor.
Plaintiff rests. [11]

Mr. Palmer: The defendant calls Mr. Griffin.

IRVING M. GRIFFIN

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Your full name, Mr. Griffin?

A. Irving M. Griffin.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Palmer:

Q. Will you state your present occupation and association, Mr. Griffin, please.

A. I am at present Assistant Director, Office of Defense Supplies, an affiliate of the Reconstruction Finance Corporation of the United States Government.

Q. How long have you been connected with the Reconstruction Finance Corporation?

A. Since April, 1942.

Q. What were your duties since April, 1942, in connection with traffic, in a general way?

A. In a general way, it was supervision of the transits, rates, and the audit of transportation bills, negotiation of rates and contracts.

Q. Prior to your connection with the Reconstruction Finance Corporation, you may state, briefly and generally, what your business was and your positions held and the companies you were [12] connected with.

A. I began transportation work at an early age, in 1893. I was connected with the International & Great Northern Railroad, beginning in the yard

(Testimony of Irving M. Griffin.)

service, developing by promotion to various positions in the freight office at Palestine, Texas, then to Houston, Texas, where I became identified with the local freight station there; promoted successively from bill clerk to chief bill clerk, chief clerk and agent; then agent, joint, at Galveston, Texas, with the I.&G.N., Missouri, Kansas & Texas, and the Galveston, Houston & Henderson Railway. I followed that position with one as General Agent at Galveston, handling import and export commodities, then followed to specializing in cotton, then Assistant General Freight Agent of the I.&G.N.; then joint with the Texas & Pacific Railway; then General Freight Agent of the Texas & Pacific, then Freight Traffic Manager of the Texas & Pacific. In 1918 I resigned from the railroads to accept a position as General Traffic Manager for George H. McFadden & Brothers, cotton exporters. I remained with them until 1937, when I was made Chairman of the Steamship Conferences of the Gulf, making rates and rules and regulations, handling import and export traffic to U.K. and Continental destinations. Then followed a call to Washington that I have just recited at the beginning.

Q. Did that work involve the application of rates, generally, to commodities?

A. Yes, sir, it did. [13]

Q. State what experience you have had in applying rates to alcohol shipments.

A. The War Production Board became prominent in the development of alcohol for national

(Testimony of Irving M. Griffin.)

defense purposes. That alcohol was allocated and shipped in accordance with the requirements of the Government. As a special duty, the alcohol transportation and rates were assigned to my office of Defense Supplies Corporation then, and it was my duty of the office and my own personally to see that proper rates were negotiated and proper rates applied to the movements of alcohol.

Q. You are familiar with the alcohol that is involved in this case and the exhibits that have just been discussed by Mr. Block, and the description on these bills of lading and shipping documents, are you not? A. I am.

Q. That description reads——

A. I might say, if I may, that I filed the claims personally, directed the claims filed, for certain readjustments of transportation charges with the S.P.& S.

Q. Very well. The description "Alcohol NOIBN, Tax Free" is the same description on all the shipments involved in this case?

A. That is my observation.

Q. What, in your opinion, is the correct rate that should be applied, from the tariff that is applicable, to this shipment?

A. It is my opinion, after very careful consideration at the [14] beginning when these claims were filed and proposals were presented to the S.P.& S., that there was only one rate applicable to these shipments, which were Government alcohol and described as tax free, or free of Internal Rev-

(Testimony of Irving M. Griffin.)

enue tax, in some cases—I think all of them read “Tax Free”—it was my definite opinion, as argued with the officials of the S.P.& S., that the rate NOS was not properly applicable, that the proper rate to apply to these shipments was the same as the in-bond rate, the shipments being the same in their relation to the in-bond description.

Q. Why do you say the shipments are the same as the in-bond rate, or should take the in-bond rate?

A. The in-bond rates contemplate, and practically in other tariffs state, that the carriers, the rail carriers, are not responsible for the revenue tax unless a shipment that is in bond is lost or stolen—in other words, not lost by casualty. The shipments described herein were shipments of alcohol which, under the ruling of the Treasury Department, the Internal Revenue regulations, was by permit withdrawn from bonded storage and delivered for transportation to Portland and other ports subsequently for delivery to vessels transporting the goods in lend-lease for national defense.

Q. Was the alcohol bought by the Defense Supplies Corporation? A. It was.

Q. State why the alcohol was tax free?

A. The alcohol was tax free as permitted by the regulations of [15] the Internal Revenue, that the United States Government might withdraw from bonded warehouses this alcohol and it became and it was the property of the Government, and the carriers handling the same were not responsible for any loss or damage whatever; therefore, it was in the

(Testimony of Irving M. Griffin.)

same category and absolutely the same description and understanding as alcohol in bond.

Q. State whether or not, in your experience as a traffic man, it is proper procedure to refer to other traffic manuals in order to get a definition of "in bond"?

A. The careful administrator or traffic man naturally would seek all the information available to correctly describe and assess charges.

Q. Will you answer that question directly? Is it proper procedure, as a traffic man, to refer to other traffic manuals?

A. We always regarded it so.

Mr. Palmer: I wish to offer in evidence at this time Defendant's Pre-Trial Exhibits Numbers 3, 4, 5 and 6.

Mr. Strayer: And 13?

Mr. Palmer: And 13.

Mr. Strayer: If your Honor please, the plaintiff objects to the admission of these exhibits on the ground that they are irrelevant and immaterial to this case, and wishes to point out in particular that the exhibits are tariffs of other lines of carriers not involved in this proceeding, and that the description of the commodity involved, namely, "Alcohol, in bond," is [16] not the same in those tariffs as it is in this proceeding; therefore, it has no bearing. The way that alcohol in bond is described in those tariffs can have no effect here or any bearing on the way that this tariff should be construed.

(Testimony of Irving M. Griffin.)

Mr. Palmer: I want to call to the attention of the Court in these exhibits that the description in these tariffs is the same, so far as—in the outside tariffs, one of them being entitled “Alcohol Tariff, New Orleans Freight Tariff Bureau”—it is Defendant’s Pre-Trial Exhibit No. 6—that is in the very heart of the alcohol transportation center, and the description in this tariff says this, being Item No. 560 on Page 50, “Alcohol, in bond, free of Internal Revenue tax,”—and the “free of Internal Revenue tax” is separated by commas—“in tank cars.”

Item No. 1563 of the applicable tariff to this alcohol read, “Alcohol (other than denatured or wood), in bond.”

Now, the “free of Internal Revenue tax” being separated by commas is explanatory of what “in bond” means. Then I will refer to——

The Court: Well, just a moment. I haven’t admitted these.

Mr. Palmer: How is that, your Honor?

The Court: I haven’t admitted these. You are using them in evidence before I have admitted them.

Mr. Palmer: Oh, I am sorry, your Honor. I was just making an explanation of our position of the——

The Court: Well, I don’t think you are entitled to it as [17] evidence. Certainly I don’t think it is substantive evidence in the case. I think this witness is testifying as an expert. He certainly can say that the reason he bases his opinion is because he has examined the tariffs of other lines and that

(Testimony of Irving M. Griffin.)

they did adopt that procedure. He is testifying as an expert, but this is not admissible, in my opinion, as substantive evidence.

Mr. Palmer: Well, I am asking it to be admitted on the grounds of explanatory evidence in connection with what the definition "in bond" means.

The Court: Well, there is a ground, as I understand it, if that is understood as a term of art, but I don't think that just because other railroads have used it in connection with other phrases indicates that it was a term of art.

Mr. Palmer: Well, I am contending that they have used it in connection with the same phrase, your Honor, and, therefore, it should go in as an explanation and not a term of art.

The Court: Well, if it is a term of art the witness can explain that, but just because it is used in other contracts by other companies is certainly no reason why the Court should use it as a term of art.

Mr. Palmer: Very well, your Honor.

The Court: I reject the exhibits as substantive evidence.

Q. (By Mr. Palmer): Will you state the manner in which "in bond" is defined in other traffic manuals?

Mr. Strayer: Just a moment. I don't believe the witness, [18] your Honor, has testified that the term "in bond" is defined in other traffic manuals.

The Court: The objection is sustained.

(Testimony of Irving M. Griffin.)

Q. (By Mr. Palmer): Will you state from what sources you have determined that tax-free alcohol as it is shipped in this case is the same kind of alcohol as it is described in the applicable West-bound Tariff No. 4-T?

A. The Item 8 in that Transcontinental Tariff referred to by the previous witness defines NOS. By referring to that definition it would state that there are no other items in the tariff on alcohol. As the witness stated, however, there was another item "in tank cars." He did not modify it by "tank cars." And then another item which covered alcohol, in bond. Now, we take it that even technical construction, that the Item 1497, reading, "Alcohol, NOS" is not in accordance with the tariff definition of the meaning of "NOS," because there are other items in the tariff on the commodity Alcohol. We also take it that the Internal Revenue Department permits the movement of alcohol from in-bond production and warehouses under certain conditions. Those conditions generally prescribe or call for bonds for the faithful performance of the conditions as covered in the permits. These are various. They go from movements tax free, where there are no taxes, and the purpose of these permits to move this alcohol was that it becomes commercial and it is not tied up or limited in its location by the warehouse or distillery that [19] produces it, so when it became necessary to move alcohol from storage as in the instant case, why, it was necessary for the Government to get a permit to move that alcohol, which

(Testimony of Irving M. Griffin.)

they did, and it was described and located as free of internal tax, Internal Revenue tax, or tax free, and it was so billed. There would be no reason in the minds of people making the shipments that the Government, the United States Government, who were the owners of this alcohol, should give a bond to themselves or put this alcohol in bond. It certainly was not "Alcohol, NOS," because it was tax free. "Alcohol, NOS" rates, if I may say it, from my investigation and knowledge, were established to cover Alcohol. If there had been no desire on the part of the Government, the Treasury Department, to permit alcohol to move, there would be only one rate, "Alcohol," either "Alcohol, ethyl"—or, not "ethyl," but just "Alcohol," and perhaps they might have said "NOS," but it was necessary to provide rates that would permit the carriers to handle these shipments of alcohol, and the carriers necessarily, finding that they had "NOS," must establish another rate, which was "Alcohol, in bond." Now, that "Alcohol, in bond" does not mean just what it sounds like. It means that the carriers have noted that their responsibility for loss or damage is less or practically nil as compared with "Alcohol, NOS." "Alcohol, NOS," if the tax was paid at the point of production the carrier would be responsible not only for the value of, say, 60 cents a gallon for the alcohol, but [20] would be responsible to the owner of the alcohol for the tax that he had paid, some, perhaps,—at the time this shipment moved I think it was probably six or seven dollars a hundred unit,—

(Testimony of Irving M. Griffin.)

that would be about somewhere around ten dollars, in addition to the value of the alcohol. Now, the Government comes along at that same time and has for transportation in the national defense the movement of this alcohol from Louisiana to Portland for delivery to ships, and they had no reason to give bond to themselves. They were the owners of the alcohol. The alcohol was tax free. The carriers had absolutely no responsibility in case of loss, not a bit, not an iota of responsibility. Therefore, it seems to me, it necessarily follows logically that they should not be called upon to pay 60 cents a gallon—a rate based on carrier's responsibility of 60 cents a gallon plus the tax.

Q. What do you say is the cost per gallon of the alcohol without the tax?

Mr. Strayer: Just a minute,——

A. Oh, from inquiry on that at the time I should say about 60 cents a gallon, 55 or 60 cents per gallon.

Q. (By Mr. Palmer): And how much do you say is the tax per gallon?

A. The tax per gallon,—I have inquired at the present time and I think it is \$9 per taxable unit, that is, per hundred, and this alcohol I think is 160-proof, probably, and nine times [21] \$9—well, 9 times 6 is 54—I think it would be about fifteen or sixteen dollars.

Q. Do you know what the value was at the time of the shipment?

A. Not positively. Just from recollection.

(Testimony of Irving M. Griffin.)

The Court: Well, how do you know all about the carriers not being responsible?

A. Your Honor,—

The Court: You are testifying to a question of law, aren't you? Are you a lawyer?

A. No, sir, unfortunately, Judge, I am not, I wish I were, but in the handling of matters that I have handled for the Government I am called on to deal with the legal sections of our Government, and naturally in attending these meetings with the carriers—I have attended them all in the negotiation of rates—now, a question that comes up always is presented as the responsibility of the carriers. I have discussed that subject with recognized traffic people, as to the items in tariffs which are free in bond, free of Internal Revenue tax, and I have gotten that impression, unquestionably that the carrier is without responsibility in handling those goods.

Mr. Palmer: I think that is all. Cross-examine.

Cross-Examination

By Mr. Strayer:

Q. Mr. Griffin, you say you have talked to traffic men and they say that without exception the in-bond rate applies? [22]

A. No, I don't say that the traffic—the Judge asked me, his Honor asked me, how I got these opinions about what the tariffs meant. I did not testify that I had talked about this particular case. I do say—

Q. Oh, I beg your pardon. I misunderstood you.

A. No, sir.

(Testimony of Irving M. Griffin.)

Q. Do you know of any other tariff, other than this one, where the tariff says only "in bond" without any additional words or phrases?

A. Well, the corresponding Tariff 1-W series of Transcontinental, applying from the Southern district, carries identically the same description of "NOIBN" and "NOS."

Q. Now, as I understand it, you agree, Mr. Griffin, that the NOIBN has no significance in this case?

A. I would say that the NOIBN put in these bills of lading was in error.

Q. Was in error? A. Yes, sir.

Q. And what do you say should have been the correct description of the alcohol?

A. I think that they should have just left that at "Tax Free."

Q. Alcohol, Tax Free? A. Yes, sir.

Q. Now, you agree, also, that there are three items in the applicable tariff here covering alcohol?

A. There are four items, as I recall it.

Q. Now, do you contend that any of the items are applicable other than the Alcohol, in bond, rate?

A. No, sir, I contend that that is the item that is applicable.

Q. You do not contend that it would fall in the Item 1498, the tank-car shipment?

A. They moved in drums.

Q. So the Item 1498 is out? It could not possibly apply?

A. That item covers movement in tank cars, if I remember right.

(Testimony of Irving M. Griffin.)

Q. So that Item 1498 is out, it could not possibly apply?

A. I should think it could not possibly be possible.

Q. Now, what was the other item you referred to?

A. Your witness designated four items.

Q. Mr. Block testified about three of them. I don't recall the fourth.

A. 1497 has two sections, hasn't it?

Q. Oh, I see. A. See.

Q. What I am trying to do is, I am trying to eliminate any other possible items. Perhaps you will agree with me that this alcohol must come under either 1497 or 1563.

A. No, sir.

Q. Is there any other item that could apply?

A. There isn't any other item in the tariff, but I say that the characteristics of Alcohol, Tax Free, puts it in the in-bond [24] section.

Q. What I was trying to do was to eliminate any confusion as to whether there was a third or fourth item that would apply.

A. No, sir.

Q. Now, you agree, also, that there was no bond on this shipment?

A. I am not in position to say that the carriers had a bond for it. When you go into that, if I may discuss it just a minute, you haven't fixed what "in bond" means. The carriers have a bond, and that bond was applicable to this movement.

Q. Now, do you know that, Mr. Griffin?

A. What?

(Testimony of Irving M. Griffin.)

Q. Do you know that?

A. That the carriers have a bond?

Q. That the carriers' bond was applicable to this movement?

A. Well, I couldn't say that. I say that the carriers must give a bond, it is in the Internal Revenue regulations, and I assume that those bonds are issued and are in force.

Q. Don't you know, Mr. Griffin, as a matter of fact, that the carrier's bond does not apply to tax-free alcohol?

A. No, sir, I do not.

Q. Well, do you know whether that is correct or not?

A. I do not.

Q. Well, you don't know whether the carrier's bond applied to this particular shipment?

A. I couldn't say that, no, sir, because I haven't examined the [25] bond.

Q. Now, as I understand you, what you are contending here is that it should be classified as in-bond alcohol because the potential liability of the carrier is the same as it would be in the case of in-bond alcohol?

A. Even less, the same or even less.

Q. And that is your only reason for saying that it should be classified as in bond?

A. That is the reason.

Q. And that is the only reason?

A. I say, that is the reason.

Q. Well, is there any other reason?

A. That is my reason.

Mr. Strayer: That is all.

(Testimony of Irving M. Griffin.)

Redirect Examination

By Mr. Palmer:

Q. Mr. Strayer asked you about if there was any other tariff manual in which alcohol is classified as Alcohol, in bond, without any further explanation. Are you familiar with any—

A. I have observed items in some of the tariffs where it does not qualify it, it does not go on with "free of tax," just "Alcohol, in bond," but I haven't observed any items "Alcohol, NOS" in other tariffs.

Mr. Palmer: I think that is all. [26]

Recross-Examination

By Mr. Strayer:

Q. Let me ask just one more question, if I may. The "NOS," generally speaking, as a tariff man, is a general classification, is it not? It is to be applied where there is no specific item in the tariff covering the shipment?

A. Well, Mr. Strayer, I can only say that the definition put in the record is the definition because it becomes a part of the tariff. Item 8 is a part of the tariff, just the same as 1563.

Q. Now, talking about this specific case, I am asking you for your opinion generally as a tariff man, the phrase "NOS" and item "NOS" is applied only where there is no specific item in the tariff covering a shipment?

A. Not necessarily a specific tariff. It says, just as it says in Item 8, that there is no other item in

(Testimony of Irving M. Griffin.)

that tariff. It is not general in its application to all tariffs. It says in this tariff "NOS," which means that there is no other item in this tariff applicable to the commodity.

Mr. Strayer: That is all.

Mr. Palmer: I want to ask one more question, if I may.

Further Redirect Examination

By Mr. Palmer:

Q. How is "in bond" defined among traffic men generally? A. Among traffic men? [27]

Q. Yes; how is it defined?

A. I can give my opinion, if I am forced to qualify as a traffic man; I can say that my interpretation means——

The Court: No, no, that is not competent.

A. Sir?

The Court: That is not competent, unless it has a well-defined meaning among traffic men.

Q. (By Mr. Palmer): That is what I am getting at: Does it have a well-defined meaning among traffic men?

A. I don't know that I am qualified to give you that answer, except from my own standpoint. Traffic men, you know, get around and exchange ideas and talk in meetings and bureau meetings and discuss things, but I don't know that there's any fixed opinions of what "in bond" means.

Q. Do you know if there is a well-defined meaning of "in bond" among traffic men?

(Testimony of Irving M. Griffin.)

A. I know to that extent that "in bond" means, so far as the liquors are concerned, means the responsibility of the carrier is practically nil, and that is——

The Court: Strike that answer. That is not a definition.

Mr. Palmer: I think that is all, your Honor.

(Witness excused.)

Mr. Palmer: May I have just a moment? I think that is our case, your Honor.

(Defendant rests.)

Mr. Strayer: I would like to call one witness in rebuttal, for just a few questions. Mr. Michelsen.

E. C. MICHELSEN

was thereupon produced as a witness in behalf of the plaintiff, in rebuttal, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Strayer:

Q. Mr. Michelsen, how long have you been with the S. P. & S.? A. Thirty-seven years.

Q. In what capacity are you there now?

A. I am Auditor of Revenue Accounts and also in charge of freight claims.

Q. In connection with your work there do you have occasion to deal with application of the tariff that is involved in this proceeding?

A. Every day.

(Testimony of E. C. Michelsen.)

Q. And do you have occasion to examine and to deal with bills of lading on shipments of in-bond material? A. Very often.

Q. Now, in your experience as a railroad man and in that capacity, Mr. Michelsen, an in-bond shipment, how is it identified on bills of lading?

A. An in-bond is identified on the bills of lading by the use of the words "in bond," and, secondly, it is generally always consigned to a Collector of Customs or a Collector of [29] Internal Revenue, and in many cases the bills of lading will show reference to the Government seals that are on the cars to protect the shipment.

Q. And upon receiving a shipment of that kind do you do anything with reference to notifying the Collector of Internal Revenue?

A. Pardon me, there is another thing I overlooked. Generally the shipment will be accompanied by some manifest papers showing that the shipment has been made under the carrier's bond.

Q. And do you do anything with reference to notification of the Bureau of Internal Revenue or the Collector of Customers on an in-bond shipment?

A. When an in-bond shipment is received at destination the car is put on the hold track and the Collector of Internal Revenue or the Collector of Customs, as the case might be, is immediately notified of the arrival of the shipment.

Q. Now, was that done in the case of these particular shipments? A. No, sir, it was not.

Q. Was there any reference to either the Customs Collector or the Collector of Internal Revenue, with reference to these shipments? A. No, sir.

(Testimony of E. C. Michelsen.)

Q. Was there any manifest indicating that the shipment was in bond? A. No, sir.

Q. Now, Mr. Griffin testified that the carriers had a bond [30] posted here. Are you familiar with the bonds that the carrier has on file?

A. I am.

Q. And does that apply to any other shipments other than in-bond shipments?

A. It applies only to shipments moving to a Collector of Customs for the purpose of collecting import duties. It does not apply and does not cover any shipments of alcohol moving to a Collector of Internal Revenue for the purpose of insuring the collection of Internal Revenue tax.

Q. So far as you know, was there any bond applicable to the movement of the alcohol involved in this proceeding?

A. No, sir, we have no bond of that kind.

Mr. Strayer: You may cross-examine.

Cross-Examination

By Mr. Palmer:

Q. What is the purpose, if you know, of notifying the Collector of Internal Revenue on these in-bond shipments?

A. The purpose is to negotiate the collection—primarily, I should have said, is to negotiate the collection of Internal Revenue tax.

Q. But these shipments that are traveling in the way you have just testified, those are shipments on which the tax has not been paid?

A. That is right. [31]

(Testimony of E. C. Michelsen.)

Q. So that the value of the alcohol is, on this non-paid tax, exactly the same as tax-free alcohol, is it not?

Mr. Strayer: I object to that as immaterial, your Honor.

The Court: Well, he may answer if he wants to.

A. Will you restate the question, please.

Mr. Palmer: Will you read the question, Mr. Rauch.

The Court: You may read the question.

(Pending question read.)

A. I don't know what value the Government would put on the alcohol. I don't know what they would claim in case we lost or destroyed some of it or some of it was stolen.

Mr. Palmer: That is all.

Mr. Strayer: That is all, Mr. Michelsen.

(Witness excused.)

Mr. Strayer: We have nothing further.

Plaintiff rests.

Mr. Palmer: Nothing further.

The Court: Do you want to argue it?

Mr. Strayer: We are willing to submit it without argument, your Honor.

Mr. Palmer: Oh, I think we are willing to submit it without argument, too.

The Court: The findings and judgment will be for the plaintiff. [32] The tariffs, it would seem to be, are exactly descriptive of what the railroad has been contracting to do,—in one case a shipment in

bond, it doesn't say anything about tax free or put any qualification on it, and obviously the shipment did not fall in one of the other classifications; therefore, if it did not fall in the in-bond classification it must necessarily have fallen into the NOS classification, which referred to "Alcohol, Not Otherwise Specified,"—in other words, not included within any other item in the tariff. Now, offhand, I should think that a shipment in bond would mean just exactly what it says, and there is no contention, as I understand it, that this was an in-bond shipment. At least, there is no proof that it was an in-bond shipment. It is true, perhaps, although I am not advised as to that, that conditions may have been the same. However, as I understand the proof in this case, this alcohol was released from bond before it was shipped, and that seems to me to take it entirely out of the classification of the tariff. I have no means of knowing—that is why I asked the witness if he was a lawyer, because I have no means of knowing that these carriers would not be responsible for what would be the market value of the alcohol if it was lost. That may be true, but offhand I wouldn't think so. I think that the Government, if they lost the alcohol, would charge them with the market value.

Mr. Palmer: May I, just in that connection, say that there is a statute that I believe relieves the carrier on some of this [33] tax-free alcohol, and I probably should get that into this case.

The Court: Well, on the other hand, I don't think that makes any difference. That is a subsidiary argument. You may quote the statute, if

you want to, but even if I knew that the Government would not charge the carrier any damages for the loss of the alcohol in full value, nevertheless, in construing this tariff at all I must take into consideration what the tariff says. It doesn't say anything about "tax free." It speaks only of shipment in bond, and, although it might be within the competency of somebody to suggest to the carrier that probably on those bases they should make another division of the tariff, I don't think they did it, and, although I might rationalize, as I am requested to do, I think, and say that the Government ought not to pay any more than the Government should have paid if the Government could have reformed the tariff before they started, I think the Government, like everybody else, should pay what the tariff specifies, and on that basis I decide for the plaintiff.

Mr. Palmer: I think that the pre-trial order provides a certain way that the money is to be awarded. I think we have money coming from the Spokane, Portland and Seattle Railway Company, and the judgment will follow the pre-trial order in that respect?

The Court: Yes.

Mr. Strayer: May I ask your Honor what the Court's practice [34] is concerning findings? Does the prevailing party ordinarily prepare the findings of the Court?

The Court: Well, you can prepare them and submit them, and if both parties are satisfied, unless I see something outstanding, I will sign them. That does not mean that the other party has to be satis-

fied with what the Court has done, but I mean satisfied with the form of expression in the findings. If you will prepare those and submit them and then pass them in to the Court, the Court will look into them and sign them. I may call a conference—I often do that, in order that the Court is sure that everybody is satisfied with the form—but you should prepare formal findings.

Further matters? Court is in recess until 2:00 o'clock.

(Which were all of the proceedings had in the above-entitled cause, and at 12:40 o'clock p.m., Tuesday, October 14, 1947, a recess was had until 2:00 o'clock p.m.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 14th day of October, A. D. 1947, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 35, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 12th day of January, A. D. 1948.

/s/ CLOYD D. RAUCH,
Court Reporter. [36]

[Endorsed]: No. 11864. United States Circuit Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. Spokane, Portland and Seattle Railway Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,864

RECONSTRUCTION FINANCE CORPORATION,
a Corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant herein relies on the following points in the above entitled appeal:

1. The Court erred in finding that: "Such alcohol was not alcohol in bond within the meaning of

Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, but was alcohol N.O.S. within the meaning of Item 1497 of said tariff. The applicable rate for all such shipments was that specified in said Item 1497, subject to land grant deductions.”

2. There was no substantial evidence to sustain the said finding.

3. Said finding is clearly erroneous.

4. Said finding is based upon an erroneous construction of the applicable tariff.

5. The Court erred on the grounds set forth under Nos. 2, 3 and 4 respectively hereinabove in finding as follows:

a. That the sum of \$2,119.12 instead of \$2,826.08 is due and owing to defendant from plaintiff on defendant's counterclaim to plaintiff's first cause of action herein.

b. That the sum of \$1,865.96 is due and owing to plaintiff instead of \$311.28 is due and owing to defendant from plaintiff on the second cause of action herein.

c. That the sum of \$3,012.82 instead of \$2,489.93 is due and owing to defendant from plaintiff on defendant's permissive counterclaim.

6. The court erred on the grounds above stated in not granting judgment in favor of the defendant and against the plaintiff for the sum of \$6,-150.18.

7. The Court erred in sustaining plaintiff's objection to evidence, to wit: Defendant's pre-trial

Exhibits 3, 4, 5 and 6 and 13 were offered in explanation of the term "in bond."

The Court sustained objection of counsel for plaintiff on the ground that the same were irrelevant and immaterial in that the exhibits were part of tariffs of other lines of carriers not involved in the case.

The Court rejected said exhibits, pp. 16, 17 and 18 of Stenographic Transcript of Proceedings in District Court.

Designation of Record

The appellant designates the following parts of the record herein as necessary for the consideration of the foregoing statement of points:

1. Complaint (omitting the exhibits attached thereto) pp. 1 to 4 Incl. of Transcript.
2. First Amended Answer and Counterclaim omitting the exhibits attached thereto) pp. 20-21 Incl. of Transcript.
3. Order substituting Reconstruction Finance Corporation for Defense Plant Corporation, pp. 10 Transcript.
4. All of the pre-trial order pp. 27-43 Incl. Transcript.
5. Findings of Fact and Conclusions of Law. Pp. 44 and 45 Transcript.
6. Judgment. Pp. 46 Transcript.
7. Notice of Appeal with Clerk's Notation of Notice to plaintiff-appellee. Pp. 27 Transcript.
8. Defendant-Appellant's Designation of Record in District Court. Pp. 48 Transcript.

9. Order of District Court for forwarding of original Exhibits to Circuit Court of Appeals for the Ninth Circuit. Pp. 49 Transcript.
10. All of stenographic transcript of proceedings at trial in District Court including stenographic transcript of testimony at the trial.
11. Defendant's pre-trial exhibits Nos. 3, 4, 5 and 6. Rejected by District Court. (Pp. 16, 17, and 18 Stenographic Transcript of Proceedings in District Court.)
12. Plaintiff's Exhibit No. 2 (Pp. 3 of Stenographic Transcript of Proceedings in District Court).
13. 1 (any one) of the 12 shipping orders of Plaintiff's Exhibit No. 7 (Pp. 3 of Transcript of Proceedings in District Court).
14. 1 (any one) of the 32 Bills of Lading of Plaintiff's Exhibit No. 8 (Pp. 4 of Transcript of Proceedings in District Court).
15. 1 (any one) of 9 Bills of Lading of Plaintiff's Exhibit No. 8 (Pp. 4 of Transcript of Proceedings in District Court).
16. Alcohol Items on Pages 57 and 58 of Defendant's Pre-trial Exhibit 13—Rejected by District Court (Pp. 16, 17 and 18 Transcript of Record District Court.
17. District Court Clerk's Certificate.

Dated February 24, 1948.

/s/ DEWEY H. PALMER,

Of Attorneys for Appellant, Reconstruction Finance Corporation. Post Address 501 U. S. Natl. Bank Bldg., Portland 4, Oregon.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Appellant's Statement of Point and Designation of Record is hereby accepted at Portland, Oregon, this 24th day of February, 1948.

/s/ M. B. STRAYER,
Of Attorneys for Appellee.

[Endorsed]: Filed Feb. 25, 1948.

[Title of Circuit Court of Appeals and Cause.]

**ORDER THAT ORIGINAL EXHIBITS NEED
NOT BE REPRODUCED IN PRINTED
TRANSCRIPT**

Upon consideration of the request of Mr. Dewey H. Palmer, counsel for appellant, and good cause therefor appearing, It Is Ordered that none of the original exhibits in above cause, consisting of bills of lading, tariffs, etc., need be reproduced in the printed transcript of record, but will be considered by this Court in their original form.

/s/ WILLIAM DENMAN,
United States Circuit Judge.

Dated: San Francisco, Calif., March 4, 1948.

[Endorsed]: Filed March 4, 1948.